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In The
Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO AND CITY OF NEW HAVEN,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners

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QUESTION PRESENTED

1. Whether a municipality's decision to alter its merit-based promotion procedures for employment in an emergency responder unit, after a merit-based promotion exam had already been administered, in order to achieve a certain racial outcome violates the equality of opportunity principles of the Fourteenth Amendment's Equal Protection Clause?

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the self-evident truth of human equality, articulated in the Declaration of Independence and codified in the Fourteenth Amendment, does not allow government to adopt race-based preferences in employment. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance.

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Elk Grove Unified School District v. Newdow*, No. 02-1624; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been filed previously. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

INTRODUCTION

This nation was founded on the affirmative premise that "all men are created equal." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." Letter from Abraham Lincoln to H.L. Pierce (Apr. 6, 1859), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 374, 376 (R. Basler ed., 1953).

Vindication of the principle of equality, and the corollary proposition of unalienable human rights, came at great cost. Winning the War for Independence was just the beginning. As Mercy Otis Warren observed, it was important that "judicious men" were "jealous of each ambiguity in law or government" so as not to "render ineffectual the sacrifices they had made for . . . the transmission of the enjoyment of the equal rights of man to their latest posterity." MERCY OTIS WARREN, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION 658 (L. H. Cohen ed., 1988) (1805). She noted that the "present representative government may stand for ages . . . if the equalization of liberty, and the equity and energy of law . . . [is] cherished." *Id.* at 696.

Our nation's founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result. Indeed, James Madison described the "protection of different and unequal faculties" as "the first object of government." THE

FEDERALIST NO. 10, at 78 (C. Rossiter ed. 1961). James Wilson added that:

> [w]hen we say all men are equal, we mean not to apply this equality to their virtues, their talents, their dispositions, or their acquirements. . . but however great the variety and inequality of men may be with regard to virtue, talents, taste, and acquirements; there is still one aspect in which all men in society, previous to civil government are equal. With regard to all, there is an equality in rights and obligations . . . In such a state, no one can claim, in preference to another, superiour right . . . .

James Wilson, Of Man as a Member of Society, Lectures, on Law (1791), *in* 1 THE FOUNDERS' CONSTITUTION, at 555-56 (P. Kurland & R. Lerner eds., 1987). Alexander Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all.*" THE FEDERALIST NO. 36, at 217 (C. Rossiter ed. 1961) (emphasis added).

These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." VA. DECLARATION OF RIGHTS, § 1 (1776). And the

Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" MASS. DECLARATION OF RIGHTS, § 1 (1780). Pennsylvania declared: "all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." PA. DECLARATION OF RIGHTS, § 1 (1776).

Of course, the promise of equality early on confronted the reality of slavery, and the Constitution had to compromise with that insidious institution in order to maintain and strengthen a Union where slavery itself could be put on the course of ultimate extinction. As Thomas Cooley noted a century later, ratification of the Constitution would perhaps have been impossible "had it not been believed by many people in all sections that the institution could have but a temporary existence and must before many years be wholly done away with." THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA, at 214 (American Foundation Publications 2001) (1880). The equality that the founders all hoped for, once slavery was done away with, was an equality of opportunity which judged each individual according to his own merit. Simeon Baldwin, one-time mayor of New Haven, son-in-law of Roger Sherman and future member of Congress, expressed the common sentiment well in a Fourth of July oration in 1788. Noting that slavery was a vice to be abolished, Baldwin exhorted his countrymen to

"make merit the passport to honour," thus "giv[ing] occasion for posterity to celebrate the day, that gave birth to this nation . . . ." Simeon Baldwin's Oration at New Haven, July 4, 1788, *in* 2 THE DEBATE ON THE CONSTITUTION, at 525 (B. Bailyn ed., 1993).

Slavery in the southern states persisted longer than many Founders had hoped despite efforts to curtail and eliminate it. One of the most forceful social and moral challenges to slavery came from escaped slave Frederick Douglass. He asked "whether the American people have loyalty enough, honor enough, patriotism enough, to live up to their own Constitution." WILLIAM S. MCFEELY, FREDERICK DOUGLASS 371 (1991). Douglass declared that "[n]o nation was ever called to the contemplation of a destiny more important and solemn than ours" and he worked for an America that offered "justice for all men, justice now, and always, justice *without reservation or qualification* except those suggested by mercy and love." WILLIAM BENNETT AND JOHN T.E. CRIBB, THE AMERICAN PATRIOT ALMANAC 41 (2008).

The stain of slavery was removed by the Civil War. To be sure, the North's stated goal at the start was to preserve the Union. However, as the scope of the war broadened, President Abraham Lincoln was able to draw on his constitutional powers as Commander in Chief to expand the purpose of the war to include abolition of slavery in the confederate states, thereby reconciling the promise of the Declaration of Independence with the workings of the Constitution. *See* HARRY JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR (2000); HARRY JAFFA, CRISIS OF THE

HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES (1959). In the Gettysburg Address, Lincoln justified the carnage of the battle with the prospect of preserving the "new nation," created by "our fathers," that was "conceived in Liberty, and dedicated to the proposition that all men are created equal." Abraham Lincoln, Address at Gettysburg, Pennsylvania, Nov. 19, 1863, *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859-1865, at 536 (D. Fehrenbacher ed., 1989). Lincoln called on "us the living" to dedicate themselves "to the great task remaining before us," to ensure "that this nation, under God, shall have a new birth of freedom," and "that government of the people, by the people, for the people, shall not perish from the earth." *Id.* Restoring the Union thus stood for two propositions, the working of popular democracy consistent with, and as a means to advance, freedom and equality for all men.

The Fourteenth Amendment's guarantee of equal protection of the laws to all citizens, regardless of race, was the fulfillment of the Declaration of Independence's promise and the Civil War's sacrifice. It specifically prohibits the states from classifying and treating citizens differently on the basis of their skin color and ethnic heritage. No one disputes that this is exactly what the respondent has done here, and why the decision of the court below must be reversed.

ARGUMENT

I. Racial Preferences, Regardless of the Justification, That Are Not Tailored to Remedy Past Wrongs Are Always Discriminatory.

Toward the end of the Civil War, Frederick Douglass eloquently urged equal treatment before the law in simply stating, "what I declare for the Negro is not benevolence, not pity, not sympathy, but simply justice." Frederick Douglass, What The Black Man Wants (Jan. 26, 1865), *in* 4 THE FREDERICK DOUGLASS PAPERS 59, 68-69 (J. W. Blassingame & J. R. McKivigan eds., 1991). He continued:

> Everybody has asked the question . . . "What shall we do with the Negro?" I have had but one answer from the beginning. Do nothing with us! . . . . All I ask is, give him a chance to stand on his own legs! . . . . If you will only untie his hands, and give him a chance, I think he will live.

Id.

Douglass understood that paternalistic preferential programs are often justified as a way to correct past moral wrongs but in fact are premised on the notion that minorities are incapable of competing on a level playing field. Unfortunately, the results of such preferential discrimination have often been just as bad for the alleged beneficiaries as were the ills which gave rise to such programs. *See, e.g.*, THOMAS SOWELL, THE ECONOMICS AND POLITICS OF RACE 200 (1983) (illustrating "counterproductive

trends" caused by "beneficial" discrimination). "Preferential treatment does not teach skills, educate or instill motivation. It only passes out entitlement by color . . . ." SHELBY STEELE, THE CONTENT OF OUR CHARACTER 121 (St. Martin's Press 1990). Even apart from its ineffectiveness, a racial preference is morally wrong because it "treats the accidental feature of race as an essential feature of the human persona . . . [and thus] violates the principles of human nature." Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 15, 49 n. 132 (1997).

These principals are not simply abstract political theory, but part and parcel of the principal of equality, articulated in the Declaration of Independence and codified in the Fourteenth Amendment's Equal Protection Clause. As Charles Sumner, one of the principle authors of that clause, wrote:

> [The principle of equality] is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution and enter into and diffuse itself through all the national legislation. Such are the commanding authorities which constitute 'Life, Liberty and the Pursuit of Happiness,' and in more general words 'the Rights of human Nature,' without distinction of race . . . as the basis of our national institutions. They need no additional support.

Charles Sumner, The Barbarism of Slavery (1860), *reprinted in* AGAINST SLAVERY: AN ABOLITIONIST

READER 313, 320 (M. Lowance ed., 2000). This view of the Fourteenth Amendment's Equal Protection clause was embraced by Justice Harlan in his dissenting opinion in *Plessy v. Ferguson*, when he noted that "our Constitution is colorblind, and neither knows nor tolerates classes among its citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). New Haven's race-balancing motivation for rejection of the results of its merit selection process flies in the face of that inspiring admonition, and it should be rejected. Indeed, the time is long overdue for government to cease treating individuals on the basis of their skin color rather than "the content of their character," and thereby to give full effect to the dream that Martin Luther King, Jr. espoused in 1963 on the steps of the Lincoln Memorial. Martin Luther King, Jr., "I have a Dream" (Aug. 28, 1963) *in* A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF MARTIN LUTHER KING, JR. at 81-87 (C. Carson & K. Shepard eds., 2001).

II. Strict Scrutiny Must Be Applied Whenever the Government Distributes Burdens or Benefits on the Basis of Racial Classifications.

This Court has consistently applied the strict scrutiny standard in cases involving racial classifications for the very reason that euphemisms like "racial balancing" are pretexts for the practice of racial preference for some and racial discrimination against others. *See, e.g., Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Grutter v. Bollinger*, 539

U.S. 306, 326 (2003); *Adarand Contractors v. Pena*, 115 U.S. 200, 224 (1995). Just two years ago, this Court restated the caution that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2752 (2007) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). Certainly the tenuous connection claimed by New Haven between a racially desired outcome and the fuzzy concern about disparate impact is anything but "exact."

A. The Strict Scrutiny Test Allows Government to Use Race in Employment and Related Contexts Only to Remedy Past Intentional Discrimination Based Upon Race.

In the school desegregation cases, this Court has considered the "'correction of past discrimination to be a compelling government interest [when] eliminat[ing] the discriminatory effects of the past as well as to bar like discrimination in the future.'" *Freeman v. Pitts*, 503 U.S. 467, 511 (1992) (quoting *Green v. County Sch. Bd. of New Kent County, VA*, 391 U.S. 430, 438 n. 4 (1968)). Such a narrow use of racial classifications has historical support. After the Civil War, for example, General William Sherman decreed that 400,000 acres of land along the fertile Georgia coast, confiscated from former slave-owners, should be set aside for the exclusive use of freed slaves. Each family was to receive 40 acres, from which comes the term 'forty acres and a

mule.' ALFRED BROPHY, REPARATIONS PRO & CON 25 (2006). Similarly, the United States government gave compensation to individual Japanese-Americans who were themselves interned during World War II because of their race and/or national origin. *Id.* at 30.

This Court's recognition of such a measured and time-limited response to identifiable past harm came with this admonition, however: "Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities." *Freeman*, 503 U.S. at 496; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality opinion). Quite simply, Justice Scalia was correct when he noted: "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual." *Adarand Contractors v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

In the present case, the City of New Haven has conceded that its use of racial categories is not necessary to remedy past racial discrimination. The respondents presented no evidence, nor did the trial court make any factual findings, that the New Haven fire department had a history of racial discrimination. Pet.App. 938a-945a, 1013a-1037a.

Rather, the record suggests that in recent years the City has gone to great lengths to *accommodate* minorities, even in the face of stern rebukes from state courts for repeatedly attempting to circumvent its own merit-based hiring policies. *See, e.g., Kelly v. City of New Haven*, 881 A.2d 978, 1000-1004 (Conn. 2005); *Henry v. Civil Serv. Comm'n*, 2001 WL 862658, *1 (Conn. Super. July 3, 2001). Under such circumstances, the use of race to determine government promotions on a preferential basis (or deny them to others) is not remedial, but rank racial discrimination.

One other aspect of the respondent's claims is particularly pernicious. The City of New Haven argues, and the court below agreed, that states could engage in racial discrimination if it believed, in "good faith," it was doing so to comply with federal law – here, Title VII of the Civil Rights Act of 1964. Resp.'s Br. 12. This justification, if accepted by this Court, would open the door to racial discrimination in many areas of state government. But more importantly, it would defeat the very purpose of the Reconstruction Amendments. As this Court has made clear in other contexts, the federal government cannot compel the states to violate the Constitution. *See, e.g., South Dakota v. Dole*, 488 U.S. 203, 210 (1987). The federal government's powers cannot force states to violate the Equal Protection Clause of the Constitution, which also prohibits racial discrimination on the part of the federal government through the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954). This Court would immediately reject the proposition that the federal government

could compel the states to reinstitute slavery or to impose poll taxes on the basis of race. This Court should act no differently if the federal government's actions were read to force the states to discriminate in employment. It would defeat the core purpose of the Reconstruction Amendments if the federal government could order the states to violate the Fourteenth Amendment's principle of racial equality.

III. Although *Grutter* Allowed a Diversity Objective in University Settings, This Court Has Never Considered Non-Remedial Racial Preferences to be a Compelling Interest and Should Not Now Do So.

This Court held in *Grutter v. Bollinger*, 539 U.S. 306 (2004), that diversity in law school education is a compelling interest. *See also Parents Involved*, 127 S.Ct. at 2752-53. According to *Grutter*, the state may consider race in the context of evaluating applications for graduate school admission, but only if race is one of many factors and does not dictate the outcome. *Grutter*, 539 U.S. at 339. ("[T]he Law School sufficiently takes into account . . . a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body").

Respondent does not contend that its purpose was to achieve diversity. But even if it did, *Grutter's* rationale cannot be stretched beyond higher education confines without gutting the core promise of the Equal Protection Clause. The compelling interest claimed by the state in *Grutter* was promoting a "multifaceted and unique learning

experience," which can only be achieved, so it was argued, by admitting students that come from different racial backgrounds. *Id.* at 316. (By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensure their ability to make unique contributions . . . ."). If this is truly a sufficiently compelling governmental interest, it is one specifically tied to a particular learning environment; it should not be extended beyond the graduate educational context.

A. Unless Racial Selection Criteria Are Restricted to the University Setting, Race-Based Decisions Are Invited in Other Contexts.

"At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

Until *Grutter*, this Court had identified as a compelling state interest only the remedying of past discrimination and, in *Korematsu* itself, the most urgent of wartime national security claims. *See Korematsu v. U.S.*, 323 U.S. 214 (1944). The subsequent statutory repudiation of *Korematsu* demonstrates the caution with which one should indulge such claims, and this case, too, demonstrates the dangers of blurring the bright-lines of the Fourteenth Amendment. If diversity is a compelling interest sufficient to overcome strict scrutiny in the

context of graduate school education, states will argue that there is no principled difference in seeking diversity in its employment and operations. States may well claim, for example, that having an emergency responder workforce that mirrors the racial composition of the community is even more important than creating a desirable educational environment.

With such arguments, the clarity of the Fourteenth Amendment's anti-discrimination principle will be undermined. That principle is meant to keep states and the courts from making these kinds of distinctions rather than simply treating all individuals without regard to their skin color. *Grutter* should not become the first step down a dangerous path that circumvents the clear prohibition against racial discrimination expressed in the Equal Protection Clause.

Governing bodies, whether civic or educational institutions, have unfortunately tried to justify the use of racial classifications by asserting that they are benign, or in the case of *Grutter* – beneficial – yet, this Court has recognized the inherent risk in any mechanism for race-based selection. Whatever the given justification, variations of the practice are still "suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. The strict scrutiny test serves to "ensure that courts will consistently give racial classifications a detailed examination, as to *both ends and means*." *Adarand*, 515 U.S. at 202 (emphasis added).

In short, applying *Croson's* and *Adarand's* three general propositions[2] for arbitration of questionable governmental racial classifications, "*any person, of whatever race*, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the *strictest* judicial scrutiny." *Adarand*, 515 U.S. at 223, 224 (emphasis added).

B. This Case Presents the Opportunity to Limit *Grutter* Only to a University's Graduate-Level Admissions Process.

There is no legal or logical basis to extend the *Grutter* justifications for racial bias beyond university classrooms and certainly not to a local fire department in New Haven, Connecticut. The diversity that *Grutter* promotes is not "racial diversity" but rather "a specific type of broad-based diversity" which only included race as a potential influence. *Parents Involved*, 127 S.Ct. at 2754. As this Court held in *Parents Involved*, this unique

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[2] First, skepticism: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination," Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 273-274 (1986); second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," Croson, 488 U.S. at 494; and third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," Buckley v. Valeo, 424 U.S. 1, 93 (1976).

holistic analysis cannot be used to justify racial discrimination even in other areas of education. *Id.* If this Court was unwilling to allow the diversity justification to school assignments in primary and secondary education, it should not extend it beyond the confines of education to the very different area of government employment.

Allowing race-conscious employment policies will open the door to creative maneuvers to evade the Fourteenth Amendment such as occurred here. The merit-based promotion test was ignored because – and only because – of the racial makeup of the results. *Ricci v. DeStefano*, 554 F.Supp.2d 142, 145-51 (D.Conn. 2006).

The City's withdrawal of the test may have helped some candidates, but it also harmed others who had passed it – solely because of their skin color. The promotion scheme is not an attempt to increase "diversity" within the parameters allowed in *Grutter*. Rather, it is merely attempting to racially balance the fire department.[3] A test that was facially neutral was used in a discriminatory manner. It is to

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[3] *Grutter* would be more like this case if, in *Grutter*, admissions were based purely on LSAT score, and Michigan then withdrew reliance on the LSAT in order to admit more minorities. Yet a Court would not uphold that type of departure, because the Court in *Grutter* specifically noted that race in that context was only part of a holistic admissions process. The fire department promotion process appears to be non-holistic. Respondents attempted to find viable promotion candidates via an examination. That process failed to yield a racially diverse group, and so they attempted to explicitly use race—a measure not endorsed by the *Grutter* Court.

prevent this sort of discrimination that this Court has found it proper to apply strict scrutiny to all uses of race by the state. *Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Parents Involved*, 127 S.Ct. at 1751.

New Haven has not identified any compelling interest that justifies refusing to promote otherwise qualified candidates, aside from simply stating that they desire more minorities in leadership positions than qualified for promotion by virtue of the exam's results. New Haven and cities that intend to practice similar employment and promotion processes are in need of a clear definition of government workplace equal treatment requirements.

IV. Merit-Based Promotion is Particularly Important in Public Safety Personnel Selection Even if Diversity is a Desired Feature in the Workforce.

This is an opportunity for this Court to make clear that "key limitations" on the diversity rationale cannot be "largely disregarded by the lower courts in extending *Grutter* to uphold race-discrimination in elementary and secondary schools" and by extension, government employment. *Parents Involved* 127 S.Ct. at 2753-54; *compare Hayden v. County of Nassau*, 180 F.3d 42, 49 (2d Cir. 1999) (holding that promoting minority police officers over more qualified white officers is not "automatically suspect"); *Kirkland v. N.Y. State Dep't. of Corr. Servs.*, 711 F.2d 1117 (2d Cir. 1983); *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984).

A. Public Safety Standards Require that Promotions in First Responder Occupations Be Awarded to the Most Qualified Candidates.

First responders, such as members of the New Haven Fire Department, respond to a myriad of different emergencies, including natural disasters, highway disasters, chemical emergencies, victim extrication, bombings, terrorist attacks and fire-related tragedies. For the safety and well-being of the victims of these emergencies, it is crucial that the first responders are capable of quickly and competently reacting to any type of disaster. First responders require a high level of expertise and knowledge within their field.

Fire department lieutenants and captains have a critical role in effective disaster response. Their tasks include responding to alarms, directing the routes to be taken to the fire, determining what types of equipment will be needed and the best methods for extinguishing fires, and supervising the work of other firefighters pending the arrival of a superior officer. Pet.App. 350a – 351a. Such supervision includes "entering burning buildings to direct their work, which may necessitate considerable physical exertion and potential hazard to health and safety." Pet.App. 363a – 365a. Often, they may be called upon to make life or death decisions. Pet.App. 167a: 186.

Mistakes by under-qualified firefighters can lead to devastating tragedies and loss of life, both for

members of the public and for other first responders. For example, in 1991, the New York Fire Department removed two firefighters from duty for retraining purposes and began disciplinary proceedings against four others after on-the-job mistakes led to the deaths of two men in Queens, New York. Joseph P. Fried, *City Cites Firefighters' Errors In Delay at Fatal Queens Blaze*, N.Y. TIMES, Jan. 19, 1991, § 1, at 33. The Department's Chief of Operations reported that the actions of one lieutenant "indicate[d] an unsatisfactory level of proficiency in basic engine company operations" and another lieutenant failed to "exercise command and control" over his unit. *Id.*[4]

In recognizing the importance of first responders to public safety, the City of New Haven established a strict merit-based promotion scheme to ensure the safety of the victims as well as the other firefighters. The New Haven Fire Department found it especially important to establish a merit-based promotion scheme because there was a prior history of entry-

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[4] Likewise, in January 2005, two New York firefighters died and six were forced to jump out of a fourth story building due to other firefighters' mistakes, communication failures and unfamiliarity with new equipment. Kareem Fahim, *Firefighting Mistakes Cited in a Report on Three Deaths*, N.Y. TIMES, Sept. 14, 2005, at B2. A report on the incident recommended that improved evacuation training, better discipline, and better preparation to deal with the water loss could have changed the outcome of the rescue. *Id. See also,* Annie Linskey, *Safety Lapses in Fire Death; Coordination Failed in Firefighter's Death in Burning House in October, Report Says*, THE BALTIMORE SUN, Apr. 28, 2007, at 1A. (Careless mistakes and safety violations by Baltimore firefighters contributed to the death of one of their own in 2006).

level hiring of firefighters based on political patronage and nepotism. Pet.App. 124a: 32. In fact, Congresswoman Rosa L. DeLauro's niece was hired by the New Haven Fire Department even though she never completed the Academy and her training was extended six weeks to help her pass. Pet.App. 125a: 38. In order to avoid situations such as these in the future, the Department found that it was best to use a merit-based promotional scheme.

B. The New Haven Tests Were Designed to Identify the Most Qualified Candidates.

In formulating the promotional exams for both the Lieutenant and Captain positions, Industrial/Organizational Solutions, Inc. (IOS) went to great lengths to insure the exam tested essential job-related skills. *See* Pet.App. 150a – 165a. These included knowledge of New Haven Fire Service rules and regulations, fire department management, general principles of firefighting, life and death decision-making, and command and control at a fire. Pet.App. 353a – 371a.

IOS also attempted to "gain maximum diversity" by including minorities in several stages of the examination process. One hundred percent of the department's minority captains and 84 percent of minority lieutenants were interviewed in the preliminary process of formulating the examination questions. Pet.App. 153a: 131. In addition, minorities represented 66 percent of the panelists asked to deliver the oral portion of the examination, far

exceeding their representation within the Department. Pet.App. 165a: 173.

With the approval of City officials, IOS also invited a battalion chief from a different fire department of comparable size and demographics to conduct an external review of the examinations. Pet.App. 158a: 150-151; 159a: 153.

After the fact, a Fire Program Specialist for the United States Department of Homeland Secured looked "extensively at the Lieutenant's exam and a little less at the Captain's exam" and concluded that the candidates "should know that material" and stated that he was comfortable with the way the test was developed. Pet.App. 564a, 566a.

C. Compromising Test Standards To Receive Particular Race-Based Results Jeopardizes Public Safety.

Despite the clear public safety concerns involved, the New Haven Fire Department has a history of admitting under-qualified firefighter candidates to their training program and relaxing standards for these candidates in order to avoid failing them.[5]

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[5] For example, some academy instructors were told to give the candidates "gimme quizzes" in order to raise failing recruits' scores. Pet.App. 142a: 92. Indeed, Petitioners contend that the New Haven Fire Academy is the only one in the country where a candidate can graduate without passing the national consensus standard of Firefighter I training. *Id.* Another failing recruit was allowed to continue in the Fire Academy despite an instructor's warnings that the recruit's inability to carry a ladder or other necessary equipment had caused injuries and

Allowing the City of New Haven to compromise essential job-related test standards for high-level fire department promotions in the name of diversity will only further jeopardize public safety.

Several Circuit Courts have recognized that hiring standards should not be compromised to increase minority representation in occupations involving public safety. In *Spurlock v. United Airlines*, for example, the Tenth Circuit rejected a black plaintiff's assertions that United Airlines should be required to lower its hiring standards in order to increase the proportion of minority airline pilots. *Spurlock v. United Airlines*, 475 F.2d 216 (10th Cir. 1972). Rather, the Court observed that:

> [W]hen the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related . . . [Here], the risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job.
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> *Id.* at 219.

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posed a continuing safety hazard to others on the training ground. Pet.App. 143a: 96.

The Sixth Circuit later applied the *Spurlock* rationale in *Zamlen v. Cleveland*, holding that an examination given to firefighter applicants did not violate Title VII even though female applicants were disproportionately unsuccessful. *Zamlen v. Cleveland*, 906 F.2d 209 (6th Cir. 1990). In *Zamlen*, the plaintiffs argued that the physical portion of the test was designed in a way that favored traditional male strengths, such as speed and strength, while ignoring attributes such as stamina and endurance, in which females often excel. *Id.* at 217. Nonetheless, the Court upheld the legality of the examination, accepting that it tested important job-related skills and emphasizing the great risk to public safety that would result from hiring unqualified firefighters. *Id.*

While *Spurlock* and *Zalmen* dealt with claims of direct racial discrimination, their rationale can be applied to the City of New Haven's act of reverse racial discrimination in this case. The public has a legitimate interest in ensuring that those hired for occupations involving public safety possess the high standards of knowledge and competence required to avoid devastating tragedies. Courts should not allow an employer to circumvent established merit-based testing standards for the purpose of racial balancing.

Although promotions based in part on racial preferences in order to improve diversity in a police department were upheld in *Detroit Police v. Young*, that case is distinguishable from the present situation. *Detroit Police v. Young*, 608 F. 2d 671 (6th Cir. 1979). In *Detroit Police*, the court emphasized the importance of public confidence and cooperation to effective crime prevention and solution. The court

reasoned that a more diverse police force may encourage more minorities to come forward with information, and/or foster better relations with members of particular minority communities. *Id.* at 696. Unlike police officers, however, firefighters' interaction with members of the public are usually confined to responding to emergency situations. In those situations, diversity is much less important than capability. Victims trapped in a burning building do not stop to notice the skin color of their rescuers but rather rely fully on the firefighters' ability to safely extricate them and their loved ones from harm. Compromising test standards for high level firefighters in order to achieve race-based results will not improve public confidence but rather jeopardize public safety.

CONCLUSION

Nearly a half century ago, Martin Luther King, Jr., described from the steps of the Lincoln Memorial his dream that one day all Americans would be judged by the content of their character and not by the color of their skin. Just last month, our country's first African-American elected to the highest office in the land urged us to recover the true meaning of the principle of equality that was established at the founding of our nation. President Barack Obama, Inauguration Speech (Jan. 20, 2009), *available at* http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?pagewanted=1. ("The time has come to reaffirm . . that noble idea, passed on from generation to generation: the God-given promise that

all are equal, all are free, and all deserve a chance to pursue their full measure of happiness"). New Haven's race-based decision to reject a promotion exam is a major step backward in those aspirational goals, and should be rejected by this Court.

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